

Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104  
(605) 335-0083  
jea44@aol.com

384614  
Attorney General

JAN - 4 2015

December 29, 2015

Steve Blair  
Attorney General's Office  
1302 E. Highway 14, #1  
Pierre, SD 57501

Re: OMC complaint 15-01 (Mitchell City Council)


Dear Steve:

After considerable thought, I have decided to take the "reconsideration" approach. I was tempted to simply go to circuit court on a mandamus/prohibition. However, I did not want to step over the Open Meetings Commission, without having given the commissioners a chance to reevaluate the case. Therefore, I am enclosing a Motion for Reconsideration in an attempt to address what I perceive to be a factual deficiency.

I would very much appreciate your forwarding this to each of the five commissioners for their consideration. If necessary, I would request that my request be put on the next agenda so that I can make my argument why reconsideration is appropriate. I realize this might not be a normal procedure for the OMC, but, as we all know, the statutes creating this mechanism did not provide a detailed blueprint.

I thank you for your time and attention.

Respectfully,



Jon E. Arneson

Enclosure

Cc: Carl J. Koch

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

In the Matter of Open Meeting Complaint 15-01,  
Mitchell City Council

MOTION TO RECONSIDER

*The Daily Republic*, a Mitchell newspaper, the Complainant, by and through its attorney, Jon E. Arneson, submits this Motion to Reconsider the Open Meeting Commission's ["OMC"] preliminary decision that the Mitchell City Council did not violate the open meetings law. The matter was heard and decided on December 16, 2015.

The motion is based on the ground that the OMC's codified procedure does not necessarily entail sufficient fact-finding on the part of the local state's attorneys. Furthermore, since "oral presentations" to the OMC are essentially a chance to make a closing argument, not to prove facts, neither party has a viable opportunity to correct factual misimpressions that might inform the OMC's decision.

In this case there remains a conspicuous uncertainty about a crucial fact. In order to properly decide this case, the OMC deserves—and needs—to know, with a reasonable degree of certainty, whether Mayor Jerry Toomey honestly considered Dan Sabers to be a "prospective" Corn Palace Director or, instead, considered Sabers' separation from the position to be a permanent one.

In the course of his oral deliberation, Commissioner Reedstrom observed that Dan Sabers remained a "prospective" employee because his attempt to withdraw the resignation "had not been acted upon in an official way." However, there is a serious flaw in that reasoning. In actuality, the request *had* been acted upon in the only "official" way required by law, namely, Mayor Toomey's non-action.

It bears repeating that Mayor Toomey has absolute power under SDCL §9-14-13 to remove the Corn Palace Director<sup>1</sup>—an authority that would obviously encompass his dealing with a resignation. Mayor Toomey did not need the Mitchell City Council's imprimatur to accept Sabers' resignation in the first instance or to refuse to allow it to be withdrawn in the second instance. In the city's written material, Carl Koch, Mitchell City Attorney, repeatedly points out the mayor's exclusive power over the appointive position of Corn Palace Director.<sup>2</sup>

Since the Mitchell City Council had no official role in the decision, Mayor Toomey's state of mind at the time of the executive session remains the pivotal fact for the OMC to determine.

Despite Mr. Koch's objection to the OMC's consideration of what are ostensibly Mayor Toomey's own words in the original Exhibit H<sup>3</sup>, the thoughts are sufficiently revealing to at least warrant further discovery of Mayor Toomey's actual perception of Dan Sabers' status as the Corn Palace Director. In view of the fact that Mayor Toomey had the prerogative to do what he wished, it is evident that statement such as "I can assure each and every one of you that every member on the city council knows the reasons for Mr. Saber's [sic] resignation and support those reasons...." and "If I could give you more accountability and insight into Mr. Saber's [sic] resignation, I would...but I can't, nor can the City Council. I have nothing more to say....I think

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<sup>1</sup> The mayor also has the power of appointment under SDCL §9-14-3.

<sup>2</sup> At page 5 Mr. Koch wrote: "I am confident in representing to the Open Meeting Commission that the Mayor fully informed the City Council regarding the circumstances surrounding this matter, notwithstanding he was under no obligation to do so." And at page 7 Mr. Koch noted that any official consideration was "solely within the province...of the Mayor in the case of an appointive officer."

<sup>3</sup> After the *Daily Republic's* counsel pointed out some problems with the city's exhibits, Mr. Koch made several corrections in a November 19 letter. Among them was the assertion that "three paragraph statement (which was provided to me by the mayor's office and erroneously incorporated in Exhibit H)" was not the mayor's statement read at the September 21 meeting and "was never publicly published or distributed in any way." Koch concluded that the statement "is wholly erroneous and should be discarded and disregarded."

there is no need for further comment from anyone" suggest, as was urged at the hearing, a *fait accompli*.

I respectfully urge the OMC to reopen this case and allow further factual discovery in order to get to the real truth. And to do that requires that the OMC have a clear understanding of how Mayor Toomey regarded Dan Sabers at the time of the September 21 executive session. As a practical and legal matter, that is the determinative factor of whether Dan Sabers was being "discussed" as a "prospective" Corn Palace Director.

To enable the OMC to have the best evidence available to make its determination, I would suggest that Mayor Toomey be asked to testify before the OMC at a future hearing. At the very least, I would ask that time be given so that the parties could take steps to provide evidence for the OMC's consideration to better establish Mayor Toomey's true state of mind at the pertinent time.

Dated this 29<sup>th</sup> day of December, 2015.

A handwritten signature in black ink, appearing to read 'JEA', with a long, sweeping horizontal line extending to the right.

Jon E. Arneson  
Attorney for *The Daily Republic*  
123 S. Main Ave., Ste. 202  
Sioux Falls, SD 57104  
605-335-0083  
jea44@aol.com

FEB - 6 2015

385772

Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
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February 5, 2015

Steve Blair  
Attorney General's Office  
1302 E. Highway 14, #1  
Pierre, SD 57501

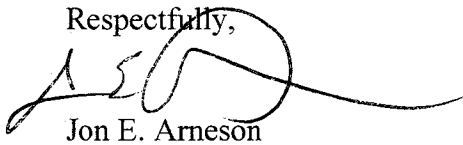
Re: OMC complaint 15-01 (Mitchell City Council)

Dear Steve:

I am submitting an affidavit that I would like made part of my Motion for Reconsideration in this matter.

If there is anything more I need to do, please let me know.

Respectfully,

A handwritten signature in black ink, appearing to be 'JEA', with a long horizontal flourish extending to the right.

Jon E. Arneson

Enclosure

Cc: Carl J. Koch

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

In the Matter of Open Meeting Complaint 15-01,  
Mitchell City Council

AFFIDAVIT OF JON E. ARNESON

STATE OF SOUTH DAKOTA) )SS  
COUNTY OF MINNEHAHA )

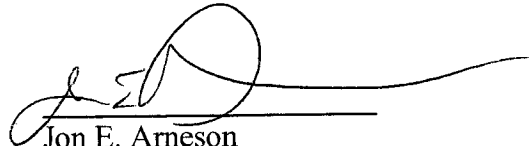
Jon E. Arneson, being first duly sworn on oath, deposes and states the following in connection with the Motion to Reconsider that was filed in the above-captioned case.

1. I am the attorney for *The Daily Republic*, a Mitchell newspaper, the Complainant.
2. I participated by teleconference in the Open Meeting Commission's ["OMC"] hearing of this case on December 16, 2015.
3. It is not disputed that the pivotal question in the case was whether the executive session was actually held for the purpose of "*discussing* the qualifications, competence, performance, character or fitness of [a]...*prospective* public officer" under SDCL 1-25-2(1).
4. It is not disputed that the answer to that question boils down to the definitions of the words "discussing" and "prospective" that are applied to the facts of the case.
5. During deliberations, the OMC members made clear they considered Dan Sabers, to have fit the definition of a "prospective" Corn Palace manager at the time of the executive session at the September 21, 2015, Mitchell City Council meeting.
6. On or about January 7, 2016, I learned that Mayor Toomey had written a letter, dated September 21, 2015, to Dan Sabers regarding his employment as Corn Palace manager.
7. Neither my client nor I was aware of that letter at the time of the hearing, although it obviously was known to Mayor Toomey, the author.
8. On December 17, I had written Carl Koch, Mitchell City Attorney, to express my unhappiness with his effort to exclude consideration of the "mistakenly" submitted Exhibit H and, in view of Commissioner Reedstrom's obvious misapprehension of the

finality of "termination" action, to ask for a clarification of the steps Mayor Toomey had taken in dealing with Saber's request for reinstatement; I heard nothing back.

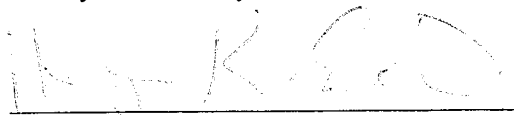
9. On January 8, 2016, I wrote a letter to Carl Koch specifically asking for a copy of the Toomey letter to Sabers; I heard nothing back.
10. On January 26, I wrote another letter to Carl Koch renewing my request and suggesting that I would start an open records action if necessary; on February 3, I received a letter from Mr. Koch in which he indicated he would be filing the letter with the OMC and would send me a copy if I did not have one; I advised him in a letter written that same day that I had not seen the letter yet.
11. Today, February 5, I received the actual letter from Dan Sabers. I am attaching and incorporating a copy of that letter to this affidavit as Exhibit 1.
12. According to the minutes of the September 21, 2015, Mitchell City Council meeting, the meeting adjourned at 11:50 p.m.

Dated this 5<sup>th</sup> day of February, 2015.

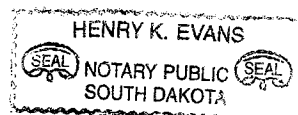


Jon E. Arneson  
Attorney for *The Daily Republic*  
123 S. Main Ave., Ste. 202  
Sioux Falls, SD 57104  
605-335-0083

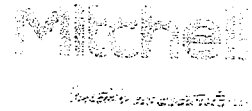
Subscribed and sworn to before me this  
5<sup>th</sup> day of February, 2016.



Notary Public – South Dakota  
My commission expires:



City of Mitchell  
612 North Main Street | Mitchell, SD 57301  
Phone: 605-995-8143  
City of Mitchell, SD



September 21, 2015

Dan Sabers  
1400 Mitchell Blvd.  
Mitchell, SD 57301

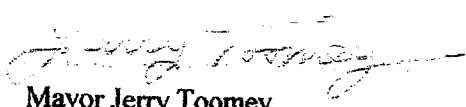
Mr. Sabers,

Your request to withdraw your resignation is denied. Your employment is terminated effective September 10, 2015.

I also decline to further discuss with you the reasons, but note that the reasons are related to ongoing performance concerns and loss of confidence in your abilities. My general policy is to not discuss employee performance issues with the public. But should an employee or former employee choose to discuss performance issues with the public that differs from the City's position, then information will be provided to the public.

If you would like further clarification, you may contact the City's legal counsel.

Thank you,

  
Mayor Jerry Toomey  
City of Mitchell



STATE OF SOUTH DAKOTA



**OFFICE OF ATTORNEY GENERAL**

1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501  
Phone (605) 773-3215  
Fax (605) 773-4106  
TTY (605) 773-6585  
<http://atg.sd.gov/>

**MARTY J. JACKLEY**  
ATTORNEY GENERAL

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

January 5, 2016

Carl Koch  
P.O. Box 546  
Mitchell, SD 57301

Re: Open Meetings Complaint 2015-01, Mitchell City Council

Mr. Koch,

I am in receipt of a Motion to Reconsider submitted by Mr. Arneson and regarding the above referenced matter. I would ask that you please submit to me in writing any objection or response you wish to file regarding the motion. I would ask that you have any response to me sometime before February 29, 2016. It is my intent to place both the motion and any response on the agenda to be considered at the Commission's next meeting.

Please let me know if you have any questions or wish to discuss the matter further.

Sincerely,

  
Steven R. Blair  
Assistant Attorney General

CC: Jon Arneson



Attorney General

MAR - 2 2016

386499

**CARL J. KOCH**

City Attorney, City of Mitchell, SD  
200 EAST 5<sup>TH</sup> AVENUE – P. O. BOX 546

Mitchell, South Dakota 57301

Office Phone (605) 996-6546

Cell Phone (605) 999-6546

Fax (605) 996-6548

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February 29, 2016

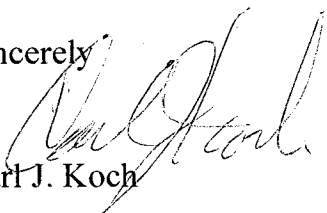
Office of Attorney General  
13201 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Attn: Atty Steven Blair  
Open Meeting Commission

Dear Atty Blair:

Find enclosed the Response of the City of Mitchell to the Motion of the Daily Republic for rehearing on their complaint - OMC File No. 2015-01, accompanied by the affidavit of Mayor Jerry Toomey regarding issues upon which the motion appears to be based.

Sincerely,

  
Carl J. Koch

CC: John Arneson, Atty at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104

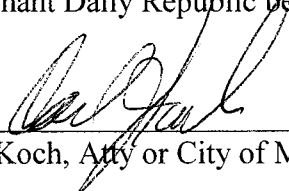
6-7-15

RESPONSE OF CITY OF MITCHELL TO MOTION FOR RECONSIDERATION BY DAILY  
REPUBLIC (OMC CASE NO. 15-01)

The City of Mitchell, SD, responds to and resists the motion of Daily Republic ("complainant") for rehearing or reconsideration, as the case may be, as moved by complainant in its motion to the Open Meeting Commission in the above referenced case (i.e. 14-01) as follows:

1. This case has been heard with all parties having had full opportunity to present their respective positions, and the matter should be closed and over.
2. Complainant appears to want more than one bit at the apple, generally deemed in the law to be fundamentally unfair.
3. Only the City Council can vote to move into executive session, the mayor may place request for executive session on the agenda, but cannot activate an executive session on his own.
4. The letter referenced by Atty Arneson is attached hereto as Attachment 1. Whether that letter deserved any response is likely a matter of opinion. In any event, this attorney did intend to respond as professional courtesy only, without entering into any substantive discussion of any kind; and the anticipated response would have so stated. Response to his letter was delayed, albeit no response other than professional courtesy response was anticipated to allow for cooling off period. However, at approximately the time a response was intended further threatening correspondence was received again raising question of whether any response was appropriate.
5. It was made clear by one or more of the commissioners that the Mayor could have changed his mind; which implicitly includes that the Mayor could have changed his mind at any time. Had the mayor heard from persons who chose to address the City Council in executive session on the date of September 21, 2015, that the facts upon which the mayor appeared (at least to them) he was relying were the result of a conspiracy by one or more other employees against Dan Sabers, it stands to reason that the Mayor (or the City Council) would have further investigated the matter, and if such information (i.e. a conspiracy or something of the like) were found to be true, surely any reasonable person would have reconsidered any previous action(s). It is implausible to think that no one person, i.e. Mayor or City Council person, did not in good faith listen to whatever it was which was related to them by the persons who chose to address them.

Accordingly, City moves that the motion of Complainant Daily Republic be denied.

  
\_\_\_\_\_  
Carl J. Koch, Atty or City of Mitchell, SD

cc: Atty John Arneson

Attachment 1

Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104  
(605) 335-0083  
jea44@aol.com

December 17, 2015

Carl J. Koch  
Mitchell City Attorney  
P.O. Box 546  
Mitchell, SD 57301

Re: Open Meetings Commission Complaint 2015-01 (*Daily Republic* v. City of Mitchell)

Dear Carl:

I must say I was surprised that you would take issue with the reference to the initial Exhibit H that you had filed with the OMC. It was very plainly a statement that could be attributed to Mayor Toomey, either directly or indirectly. In light of the representations that were being made regarding Dan Saber's genuine viability as a "prospective" Corn Palace Director, I believe it to be a legitimate piece of information for the OMC's consideration.

Let me refresh your memory on this point. In recognizing that your exhibits were a little confusing, I raised this inquiry about Attachment H in my November 4 letter:

Attachment H purports to be a verbatim transcript of Mayor Toomey's comments regarding "public input/executive session" at the September 21 meeting. **However, the statements made on the Exhibit H page, while those of Mayor Toomey, are directed to the issue of transparency.** There is also an unidentified page with a statement that is presumably what Mayor Toomey said with respect to the timing of the "public input session." **Would you please advise me whether both of these Toomey statements are Attachment H. If not, will you please indicate if and when Mayor Toomey made the comments shown on the page marked as Exhibit H?** That they were reproduced in different fonts caused me to question the origin. [Emphasis added.]

In your November 19 response to that question, you wrote, "The three paragraph statement (which was provided to me by the mayors office and erroneously incorporated in Exhibit H) was the wrong document. Anybody capable of reading would readily conclude that that three paragraph statement that you admit came from the mayor's office was a statement of the mayor. That it wasn't what he read at the September 21 meeting is of no consequence to its materiality. That such a document existed was what mattered, regardless of your belated plea to have it "discarded and disregarded." As officers of the court, I think we are supposed to be interested in the truth, and that particular statement, in my opinion, had a direct bearing on what the truth was in this case. Had you some reasonable explanation why that document was not "admissible" in the loose sense of the OMC's procedure, you had the mayor right there with you. If the substance of that statement was being unfairly attributed to him, he could and should have made that clear to

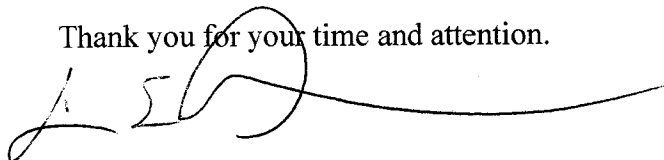
the OMC. As it is, you and I both know this was, in fact, prepared by or for the mayor. That it might not have been released publicly does not alter the facts admitted in the statement. Again, if the mayor wanted to deny those facts, he had the opportunity.

In short, I offer no apology for bringing up that statement, since it was valid evidence of a situation that contradicted what the OMC was otherwise sensing about the mayor's handling of the Sabers resignation and request for reinstatement.

And that brings to mind a question I have for you now. What steps did Mayor Toomey take in responding to the September 15 letter from Sabers' attorneys? I think that was completely overlooked in the fact-finding here. Just for my own peace of mind, I would appreciate a reply. Just to be clear, I don't give a damn about any substantive details. All of the matter that you brought up in the last two-thirds of your presentation is completely outside my interest zone. I do, however, think I have a right to know what procedural steps the mayor took in dealing with Sabers' reinstatement request. Based on what Commissioner Reedstrom was contending, there appears to be some serious misunderstanding about facts that suddenly have become of importance now that the OMC has made one of the worst decisions in its history.

One of the reasons I am asking for this is that although the AG liaison, Steve Blair, will prepare finding and conclusions, we both have a right to prepare our own proposed findings and conclusions for the OMC's consideration. Although I have little expectation that the OMC will pay the slightest bit of attention to anything I offer, I might at least want something on the record as a matter of principle. From my perspective—and possibly yours—what I'm asking you to tell me is of more than passing interest.

Thank you for your time and attention.

A handwritten signature in dark ink, appearing to read 'J. E. Arneson', with a long horizontal line extending to the right.

Jon E. Arneson

P.S. I will be gone for the next two weeks, so I would appreciate it if you would send your reply to me by e-mail (jea44@aol.com). I don't know that you have your own e-mail, but I assume you can use something within the city government and simply attach a letter of your own.

STATE OF SOUTH DAKOTA

SS

COUNTY OF DAVISON

AFFIDAVIT OF JERRY TOOMEY

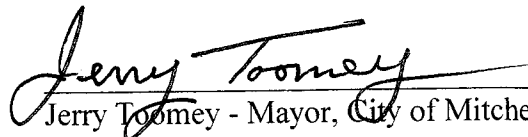
JERRY TOOMEY, BEING FIRST DULY SWORN UPON HIS OATH, DEPOSES AND STATES:

1. That he is now and has been at all times relevant hereto been the duly elected and acting mayor of the City of Mitchell, SD.
2. Attached hereto as Attachment 1, is the statement prepared by myself prior to the regular city council meeting occurring on the date of September 21, 2015.
3. Attached hereto as Attachment 2, is a statement prepared by myself prior to the preparation of the statement shown at Attachment 1. My reason for preparation of the prepared statement shown at Attachment 2 is that upon obtaining advice from Atty Lisa Marso, I changed my mind as to the statement I would make to the persons present (the crowd) who had come to address the City Council regarding the termination of Dan Sabers. The last word of that statement, as prepared by myself, was left blank inasmuch as at the time I prepared the same, I was unsure of what the appropriate time would be to anticipate the City Council voting whether or not to go into executive session. At the time I read this statement to the persons in attendance at that meeting, at the point on the Agenda for "PUCLIC INPUT", I stated the time as nine o'clock (9:00), as by that time, I expected that the time by which other scheduled business would be completed would be approximately that time.
4. For whatever reason, the statement provided by myself or my office (I don't recall the specifics) the statement shown at Attachment 1 had been provided to Atty Carl J. Koch. Thereafter, and prior to submission of the response ~~of me~~ to the open meeting complaint of the Daily Republic (upon which hearing has previously been held) the statement shown at Attachment 1 was included purporting to be the statement made by me to the persons (the crowd) in attendance at that meeting at the point of the agenda of "PUBLIC INPUT". In reviewing he draft of documents provided to me by Atty Koch, I noticed that the wrong statement (i.e. Attachment 1 rather than attachment 2) was included. Upon pointing this out to Atty Koch, he did obtain from me the correct statement (attachment 2) and either upon his memory or upon information from me, retyped the statement (according to information provided to me by said attorney) to include the words "nine o'clock". This explanation has previously been made to the Open Meeting Commission.
5. Attached hereto as Attachment 3 is the form (copy) of the letter sent by me and addressed to Dan Sabers on the afternoon of September 21, 2015.

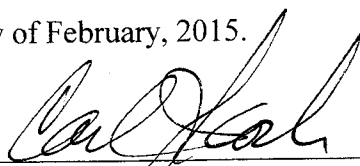
Notwithstanding my depositing of that letter into the outgoing mail of the City, had I heard information from any person who addressed the City Council on that evening in executive session which would have caused me to doubt that the information upon which I was relying was not true, or not reliable for whatever reason, I would have further investigated the matter, or had an investigation of the allegations (i.e. information materially different from that which I had and was relying upon) and pursued same to ground; and I the investigation by myself or whomever indicated that I had been provided information materially different from that upon which I had and was relying, I would certainly have reconsidered my stated position on whether my position on rejecting Mr. Sabers' request for withdrawal of his resignation was appropriate. I reserve at all times my right to change my mind, either upon further consideration or upon receipt of credible information contrary to the material believed facts upon which any decision I make, including decision of mine in respect to Mr. Dan Sabers, are made.

5. At some point, upon inquiry from Atty Carl J. Koch, I did advise him that I had mailed the letter to Mr. Dan Sabers on the date of September 21, 2015. However, my belief, upon best recollection, is that that information was not conveyed to Atty Koch as of the time of the initial hearing on this matter. I was present for the entirety of the presentation made by Atty Koch, and clearly recall my impression that all representations made by Atty Koch to the Open Meeting Commission during the initial hearing of this matter (telephone hearing) were true and correct. I have no recollection of any kind that any representation made by Atty Koch was incorrect.

Further affiant saith not.

  
Jerry Toomey - Mayor, City of Mitchell SD

Subscribed and sworn to before me this 29th day of February, 2015.

  
Notary Public - South Dakota  
My Commission Expires: 6/17/18

A Hachmat #1

Because there have been concerns regarding accountability and insight into the resignation of Dan Sabers, I will respond by telling everyone that the City is not permitted to speak openly about personnel issues to the public. The City's commitment is to not discuss personnel matters in order to protect a person's privacy and to protect the City. I can assure each and every one of you that every member on the city council knows the reasons for Mr. Saber's resignation and support those reasons. We believe the city's stand on protecting a person's privacy is one of integrity rather than a lack of transparency.

There have been comments made regarding Gridlock, lack of transparency, and that there is zero communication between myself and the City Council. That is totally false and the City Council would support me on that statement. For anyone to say otherwise is irresponsible and is nothing more than an attempt to create a divisive atmosphere in the public eye.

I have always maintained an open door policy and I have always promoted transparency within the confinements of City Policy and State Law. If there is anyone wishing to speak to me one-on-one, you have that ability to do so, but when it comes to personnel issues, I am limited on what I can or cannot say. If I could give you more accountability and insight into Mr. Saber's resignation, I would.....but I can't, nor can the City Council. I have nothing more to say.....I think there is no need for further comment from anyone.

## Attachment # 2

I have heard that there may be some citizens here tonight that would like to address the Council regarding personnel issues. Before we begin the Public Input session, I need to inform you that it is the policy of the City of Mitchell to address personnel issues only during Executive Session, NOT during the public meeting. However, if anyone wishes to address the Council you are more than welcome to attend the Executive Session after the regular meeting, and will have the opportunity to state your concerns at that time. We will have individuals address the Executive Session one person at a time. According to the way the Agenda looks, we should be starting our Executive Session around 9:00 p.m.



Attachment 3

City of Mitchell

612 North Main Street | Mitchell, SD 57301

Phone: 605-995-8143

City of Mitchell, SD

Mitchell

City of Mitchell, SD

September 21, 2015

Dan Sabers  
1400 Mitchell Blvd.  
Mitchell, SD 57301

Mr. Sabers,

Your request to withdraw your resignation is denied. Your employment is terminated effective September 10, 2015.

I also decline to further discuss with you the reasons, but note that the reasons are related to ongoing performance concerns and loss of confidence in your abilities. My general policy is to not discuss employee performance issues with the public. But should an employee or former employee choose to discuss performance issues with the public that differs from the City's position, then information will be provided to the public.

If you would like further clarification, you may contact the City's legal counsel.

Thank you,



Mayor Jerry Toomey  
City of Mitchell



Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104  
(605) 335-0083  
jea44@aol.com

386876  
Attorney General

MAR 14 2016

March 9, 2016

Steve Blair  
Attorney General's Office  
1302 E. Highway 14, #1  
Pierre, SD 57501

Re: OMC complaint 15-01 (Mitchell City Council)

Dear Steve:

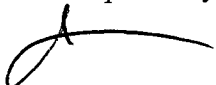
I am enclosing a reply to the city's response to the newspaper's motion for reconsideration in the above-reference matter. I would appreciate it if you would forward it with the other materials to the OMC commissioners in advance of their next scheduled meeting.

Also, I would like to know if the previous filings (motion for reconsideration, my affidavit and the 9/21/15 Mayor Toomey to Dan Sabers letter, the city's response and Mayor Toomey's affidavit) have already been sent to the commissioners.

In the event they have not, I feel I need to make an effort to protect my client from the gratuitous prejudice that might ensue from Mr. Koch's gratuitous attachment of my 12/17/15 letter to the city's response. That was a personal letter to him, and while I stand by my comments, it has relevance only to show when I began asking Mr. Koch to "clarify" some of the factual concerns. It would seem obvious that Mr. Koch included it for the sole purpose of getting the OMC to read of my displeasure with its decision. I would let it go, were I representing myself. However, my client should not be unfairly punished. By copying him on this letter, I am asking him to either withdraw or redact the letter to reflect only what is in issue.

Thank you, Steve, for your time and attention.

Respectfully,



Jon E. Arneson

Enclosure

Cc: Carl J. Koch

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

In the Matter of Open Meeting Complaint 15-01,  
Mitchell City Council

COMPLAINANT'S REPLY  
TO RESPONDENT'S RESPONSE  
TO MOTION TO RECONSIDER

Complainant [*The Daily Republic*] submits this reply to the Respondent's ["Mitchell City Council"] response to the pending reconsideration motion. *The Daily Republic* originally asked for reconsideration because the OMC's decision appeared to be based on a misunderstanding of the respective roles of the mayor and the council. Subsequent to filing the reconsideration motion, *The Daily Republic* learned of the existence of a letter from Mayor Jerry Toomey to Dan Sabers.<sup>1</sup> Plainly, the letter's content has a direct bearing on Sabers' status as a "prospective" public officer, a crucial issue in the case. Therefore, the OMC deserved to be made aware of the letter.

The Mitchell City Council's allegation that reconsideration would be "fundamentally unfair" insinuates a governmental body that does not share the public's interest in having open meetings law applied correctly—regardless of forum. Especially in light of the new evidence, there is absolutely nothing "unfair" in *The Daily Republic's* approach.

The legal issue in this case is whether the "purpose" of the Mitchell City Council's closed meeting on September 21, 2015, was permissible subject matter under SDCL §1-25-2(1). In its initial filing with the OMC on October 30, 2015, the Mitchell City Council acknowledged the "specific purpose" for the executive session was to listen to public comment concerning the

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<sup>1</sup> *The Daily Republic*, which learned of letter's existence on or about January 7, 2016, finally procured a copy on February 5 and filed a copy with the OMC that same day.

resignation and/or reinstatement of the former Corn Palace Director, Dan Sabers. That subject matter, *i.e.* the Corn Palace Director resignation/reinstatement, comes under the mayor's jurisdiction, not the council's. Consequently, there are two discrete reasons for the OMC to reevaluate and reverse its decision.

**1. The subject matter does not come within the purview of SDCL §1-25-2(1).**

From comments made during the OMC's open deliberations, *The Daily Republic* has reason to believe that the commissioners have overlooked that under SDCL §9-14-13 and §9-14-3, the hiring, firing, resigning, or reinstating of the Corn Palace Director falls under the mayor's jurisdiction, not the council's.

It is a crucial distinction, since SDCL §1-25-2(1) logically extends only to employee matters upon which the "public body" has the actual authority to act. Absent that "public body" responsibility, the matter is not an appropriate topic for executive discussion by that "public body" under SDCL §1-25-2(1). Legislation permitting a government body to hold closed meetings to talk about issues beyond its control makes no sense. Then, too, SDCL §1-25-2 is an exemption statute, which makes it essential that it be interpreted in a reasonably narrow sense. It is well-established policy in South Dakota that statutory exceptions are strictly construed, giving the benefit of any doubt to the general law to carry out its purpose. *Peters v. Spearfish ETJ Planning Com'n*, 1997 S.D. 105, ¶13, 567 N.W.2d 880; *1<sup>st</sup> American Systems, Inc. v. Rezatto*, 311 N.W. 2<sup>nd</sup> 51, 55 (S.D. 1981); *Western Surety Co. v. Mydland*, 179 N.W.2<sup>nd</sup> 3 (S.D. 1970); *Lien v. Rowe*, 92 N.W. 2<sup>nd</sup> 922, 924 (S.D. 1958).

If the Corn Palace Director's employment/termination were governed by SDCL §9-14-12, it would be different. But since it is not, the open meeting exception cited by the Mitchell City Council has no application in this case. The Mitchell City Council had no business going

into executive session “for the purpose of discussing” a matter that was not its actual business in the first place.

Whatever Mayor Toomey’s view of Dan Sabers as a “prospective” Corn Palace Director, the point is it was the mayor’s call, not the council’s. Subject matter not delegated to public body is not a proper topic for executive session discussion. And Dan Sabers, as “prospective” Corn Palace Director, was not the Mitchell City Council’s responsibility.<sup>2</sup>

## **2. Dan Sabers was not a “prospective” public officer at the time of the executive session.**

Assuming, *arguendo*, that a “public body” could hold an executive session “for the purpose of discussing prospective public officers” not appointed by it, the question becomes whether the person being discussed was “prospective” in the mind of the person with the hiring/firing power. Specifically, in this case the question is this: As of the Mitchell City Council meeting on September 21, 2015, was Dan Sabers a “prospective” Corn Palace Director in Mayor Jerry Toomey’s mind or had Mayor Toomey effectively “acted upon [Sabers’ request for reinstatement] in an official way?”<sup>3</sup>

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<sup>2</sup> It is worth noting that the Mitchell City Council has acknowledged multiple times that the handling of this “personnel matter” was the mayor’s prerogative.

- Answer, p. 5: “...the Mayor fully informed the City Council regarding the circumstances surrounding the matter, notwithstanding he was under no obligation to do so.”
- Answer, p. 5: “...and it is only the Mayor who can terminate an appointive officer.”
- Answer, p. 7: “What consideration...listeners (i.e. the governing body in this case) give to any citizen’s statement is an entirely different matter, and solely within the province of the governing body (actually the Mayor in the case of an appointive officer).”

Even the protestations that the fat lady had not yet sung, confirm it was the mayor’s concern.

- Response, ¶5: “the Mayor could have changed his mind;”
- Toomey affidavit, ¶4: “had I heard information...in the executive session which would have caused me to doubt the information upon which I was relying....”

<sup>3</sup> The Mitchell City Council, in its answer, declared the anticipated “citizen’s input” was intended “through force of numbers [to] put pressure on the governing body to re-instate [sic] the subject person in his prior appointed position as Corn Palace Director.”

Since there is no such thing as mind-reading, the OMC's task is to consider the available evidence and determine what Mayor Toomey's state of mind was reasonably likely to have been at the pertinent time. In the motion for reconsideration, *The Daily Republic* maintained that Mayor Toomey's conduct and statements leading up to the September 21, 2015, council meeting were persuasive indications that he did not consider Dan Sabers to be a "prospective" employee in any meaningful sense of the word.

The September 21 2015, letter written and mailed by Mayor Toomey to Dan Sabers<sup>4</sup> before the Mitchell City Council meeting that evening serves to confirm that the *The Daily Republic's* theory was correct. That letter sent a very clear, very blunt and very forceful message to Dan Sabers that he was finished as the Corn Palace Director.

In its attempt to convince the OMC that Sabers was a "prospective" public officer, Mitchell City Council relies on Mayor Toomey's assertion that he retained the right to change his mind. But "free will" is not the determinative factor. What is important is what his state of mind actually was.

Mayor Toomey's deliberate decision to write and send his letter to Dan Sabers on the very day on which he knew Sabers' supporters intended to appear at the council meeting was patently calculated. So too was the statement he wrote in preparation for dealing with those Sabers' supporters at the meeting:

I can assure each and every one of you that every member of the city council knows the reasons for Mr. Saber's resignation and support [sic] those reasons.....If I could give you more accountability and insight into Mr. Saber's resignation I would.....but I can't, nor can the City Council. I have nothing more to say.....I think there is no need for further comment from anyone.  
[Ellipses in the original.]

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<sup>4</sup> It is inconceivable that Mayor Toomey, who voluntarily participated in and spoke at the hearing, was unaware of the letter's relevance when he chose not to disclose it to either the Mitchell City Attorney or the OMC.

According to Mayor Toomey, on advice of counsel, he read a shorter statement at the meeting. That he did not refer to Dan Sabers by name, however, did not establish any change in Mayor Toomey's attitude toward Sabers. His written statement, above, conveys his mind-set on Dan Sabers and the Corn Palace Director position.

There was nothing in either Mayor Toomey's actions or words during this period to suggest that he was in the least bit hesitant or indecisive. All the evidence leads, inescapably, to the conclusion that Mayor Toomey harbored *no* doubt about Dan Sabers. In Mayor Toomey's mind, Dan Sabers was a "prospective" public officer only to the extent that he was not dead.

All credible, objective evidence indicates that Mayor Toomey did not view Dan Sabers as a "prospective" public officer at the time of the September 21, 2015 executive session. Mayor Toomey's recent argument that his mind remained open to change by public input is unconvincing. While it is a convenient claim for him to make at this point, it completely contradicts everything he said and did in relation to Dan Sabers. The newly discovered letter to Dan Sabers, alone, confirms that the "open mind" defense is disingenuous.

### **Conclusion.**

Mayor Toomey, in a September 16, 2015, interview with *The Daily Republic* provided a neat summarization of the situation. He told *The Daily Republic*:

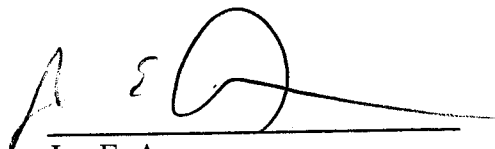
- He was unconcerned about recent department head turnover;
- Prospective applicants for the Corn Palace Director position had already shown interest;
- Advertising for the Corn Palace Director job would begin on September 18, 2015, and end October 12;
- Applications would then be assessed by the human resources department;
- Candidates would first be interviewed by Human Resources Director; and
- Prospects would then be interviewed by Mayor Toomey, who would make the final decision.

Mayor Toomey's comments serve to accentuate the two most consequential facts for the OMC's consideration:

- On September 21, 2015, nobody, including Dan Sabers, was yet being discussed as a "prospective" Corn Palace Director by anybody;
- That the "vetting" process was not something the Mitchell City Council would be involved in in any case.

Within the framework of the applicable law, these facts compel a reversal of the OMC's previous decision that the Mitchell City Council's executive session was lawful within the meaning of SDCL 1-25-2(1). The council lacked jurisdiction over the subject matter of the executive session, and, regardless, the "discussion" did not involve a person who could legitimately be described as a "prospective" public officer.

Dated this 9<sup>th</sup> day of March, 2016.

A handwritten signature in black ink, appearing to read 'Jon E. Arneson', written over a horizontal line.

Jon E. Arneson  
Attorney for *The Daily Republic*  
123 S. Main Ave., Ste. 202  
Sioux Falls, SD 57104  
605-335-0083  
jea44@aol.com



Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104  
(605) 335-0083  
jea44@aol.com

Attorney General

APR 14 2016

387 839

April 11, 2016

Steve Blair  
Attorney General's Office  
1302 E. Highway 14, #1  
Pierre, SD 57501

Re: OMC complaint 15-01 (Mitchell City Council)

Dear Steve:

I am enclosing a second affidavit that has become necessary due to Mayor Toomey's apparent lapse of memory. I would like this to be attached and part of my client's Motion to Reconsider.

I intend to file my objections and proposed findings and conclusions as soon as I have some indication from Mr. Koch whether I can expect any further clarification from Mayor Toomey regarding the most recently discovered items.

Thank you, Steve, for your time and attention.

Respectfully,



Jon E. Arneson

Enclosure

Cc: Carl J. Koch

In the Matter of Open Meeting Complaint 15-01,  
Mitchell City Council

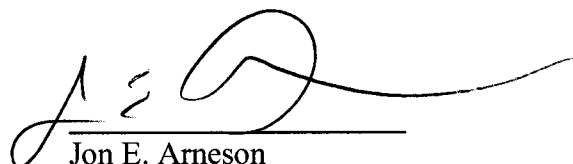
STATE OF SOUTH DAKOTA) )SS  
COUNTY OF MINNEHAHA )

1. I am the attorney for *The Daily Republic*, a Mitchell newspaper, the Complainant.
2. Following the hearing in this matter and after filing the Motion for Reconsideration, I became aware that Mayor Toomey had written Dan Sabers a letter, dated September 10, 2015—the same day Mayor Toomey requested and received Sabers’ resignation. The letter does not specifically address Sabers’ performance or tenure as Corn Palace Director, but does convey Mayor’s Toomey’s threat to sue Dan Sabers over what appears to be a personal matter.
3. I had asked Carl Koch to produce a copy of the letter, but was advised in a March 29 letter that Mayor Toomey has no recollection of having written it.
4. Although I do have a copy of the September 10, 2015, letter from Mayor Toomey to Dan Sabers, I have not attached it to avoid causing any unnecessary embarrassment, preferring instead to give Mayor Toomey an opportunity to explain why it is or is not related to the Sabers’ resignation.
5. I am renewing my request for such an explanation by letter to Carl Koch today.
6. After the hearing and following the submission of the Motion to Reconsider, I was also made aware that a citizen had sent Mayor Toomey an e-mail praising Dan Sabers’ work as Corn Palace Director and expressing disappointment in his “termination.” To protect the privacy of the person, the e-mail has not been attached.

7. Mayor Toomey also claimed to have no recollection of receiving this correspondence or of having replied to it, both of which happened on September 16, 2015.
8. On September 16, 2015, Mayor Toomey sent a responsive e-mail that included the following:

It is city procedure to not disclose reasons for termination of city appointed officials. I have no intention to disclose detailed information that may or may not prove harmful to Dan in his pursuit of future employment goals. I have heard untruthful comments that are being made by dan, but I can ensure [sic] you that there are valid reasons for his termination. If Dan chooses to talk about it, then that is his choice. I would only caution him to not make false statements that could result in possible litigation against him should I deem such comments as defamatory against me personally. I don't believe Dan would appreciate my talking about the reasons for his termination as it certainly would not be in his best interest. I can further assure you that I have nothing personal against Dan Sabers, and certainly no vendetta to cause him harm.

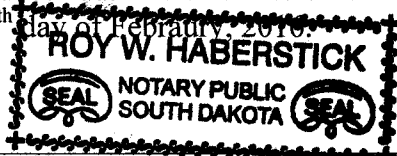
Dated this 11th day of April, 2016.



Jon E. Arneson  
Attorney for *The Daily Republic*  
123 S. Main Ave., Ste. 202  
Sioux Falls, SD 57104  
605-335-0083

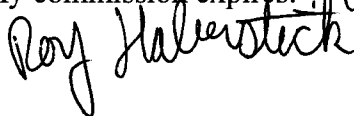
Subscribed and sworn to before me this

5<sup>th</sup> day of February, 2016.



Notary Public - South Dakota

My commission expires: March 24, 2022





Jon E. Arneson  
Attorney at Law  
123 South Main Avenue, Suite 202  
Sioux Falls, SD 57104  
(605) 335-0083  
jea44@aol.com

Attorney General

APR 18 2016

387932

April 13, 2016

Steve Blair  
Attorney General's Office  
1302 E. Highway 14, #1  
Pierre, SD 57501

Re: OMC complaint 15-01 (Mitchell City Council)

Dear Steve:

I just received a letter in today's mail from Mr. Koch. While he did not have the benefit of my April 11 letter before responding, I am doubtful anything more is to be gained from any correspondence regarding Mayor Toomey's intentions.

However, I do think the last paragraph of Mr. Koch's letter merits the OMC's attention. It seems to be a strongly worded assertion regarding Mr. Sabers' status. It also repeats the use of the term "termination" that I believe sheds more revealing light on the case.

Therefore, I am enclosing a copy of the letter to be another exhibit attached to my client's Motion to Reconsider. In my opinion, it tends to confirm what the truth of the matter was, Mayor Toomey's belated protestations notwithstanding.

I am also enclosing objections and proposed findings and conclusions on behalf of my client. I am filing those with the understanding that they will not be shared with Mr. Koch until he has submitted whatever he might prepare for his client. I do intend to send Mr. Koch a copy of my own objections and proposals on the due date, April 22.

Respectfully,



Jon E. Arneson

Enclosure

Cc: Carl J. Koch

# CARL J. KOCH

Attorney and Counselor at Law  
200 E. 5<sup>th</sup> Ave. - P. O. Box 546  
Mitchell, South Dakota 57301

Office: 605-996-6546 - Cell: 605-999-6546 - FAX: 605-996-6548

April 8, 2016

Atty Jon E. Arneson  
123 South Main, Suite No. 202  
Sioux Falls, SD 57104


Re: Open Meeting Complaint of Daily Republic

Dear Atty Arneson:

Subsequent to my last correspondence the mayor recollected that he had sent a message to Dan Sabers regarding a photograph. My presumption is that that message was the subject matter of your last correspondence. The mayor advised me that the subject matter of that message did not constitute the reason for the termination (by resignation) of Dan Sabers.

As it is obvious that you or someone on your behalf is in communication with Dan Sabers, Mr. Sabers can provide a complete explanation to you of what that was all about. I would also suggest that if Dan Sabers were to execute and deliver to the City an instruction to release his personnel file, and which would contain a hold harmless clause in respect to the City of Mitchell, SD, including its elected officials and all other officers, employees, representative and agents of the City, together with a covenant not to sue, the apparent mystery (not a mystery to Dan Sabers) of the reason for his termination could be released and made public.

Sincerely



Carl J. Koch

cc: Mayor Jerry Toomey

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

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IN THE MATTER OF OPEN  
MEETINGS COMPLAINT AGAINST  
MITCHELL CITY COUNCIL  
(DAVISON COUNTY)

OMC 2015-01

*THE DAILY REPUBLIC'S* OBJECTIONS  
AND PROPOSED CHANGES/ADDITIONS  
TO OMC'S FINDINGS AND CONCLUSIONS

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*The Daily Republic*, a Mitchell newspaper, the Complainant, by and through its attorney, Jon E. Arneson, submits objections to the OMC's proposed Findings of Fact and Conclusions of Law and offers proposed changes to those Findings and Conclusions.

**Objections to OMC's Proposed Findings of Fact**

**Findings #1 through #18:** *The Daily Republic* does not object to the OMC's proposed Findings #1-#18.

**General objection:** *The Daily Republic* objects to the OMC's proposed Findings of Fact on the ground that, cumulatively, they are an incomplete statement of the evidence that should be taken into consideration.

**The Daily Republic's Proposed Additional Findings of Fact**

**Finding #19:** On September 21, 2015, before the Mitchell City Council meeting, Mayor Toomey mailed a letter to Dan Sabers, in which Mayor Toomey wrote:

Your request to withdraw your resignation is denied. Your employment is terminated effective September 10, 2015.

I also decline to further discuss with you the reasons, but note that the reasons are related to ongoing performance concerns and loss of confidence in your abilities. My general policy is to not discuss employee performance issues with the public. But should an employee or former employee choose to discuss performance issues with the public that differs from the City's position, then information will be provided to the public.

If you would like further clarification, you may contact the City's legal counsel.

[Toomey affidavit, attachment #3]

**Finding #20:** On September 10, 2015, Mayor Toomey wrote Dan Sabers a letter in which he threatened to sue Dan Sabers in connection with what appears to be a personal matter. [Arneson affidavit #2] In following up on any possible connection between that letter and Dan Sabers "termination," counsel for the *Daily Republic* received a letter from Carl Koch suggesting that if Dan Sabers authorized the City of Mitchell to release his personnel file, "the apparent mystery (not a mystery to Dan Sabers) of the reason for his termination could be released and made public," which is a clear indication that the issue was not in doubt at the time of the executive session.

**Finding #21:** On September 16, 2015, Mayor Toomey received an e-mail from a citizen praising Dan Sabers and expressing disappointment in his "termination;" Mayor Toomey wrote in a responsive e-mail that same day the following:

It is city procedure to not disclose reasons for termination of city appointed officials. I have no intention to disclose detailed information that may or may not prove harmful to Dan in his pursuit of future employment goals. I have heard untruthful comments that are being made by Dan, but I can ensure [sic] you that there are valid reasons for his termination. If Dan chooses to talk about it, then that is his choice. I would only caution him to not make false statements that could result in possible litigation against him should I deem such comments as defamatory against me personally. I don't believe Dan would appreciate my talking about the reasons for his termination as it certainly would not be in his best interest. I can further assure you that I have nothing personal against Dan Sabers, and certainly no vendetta to cause him harm.

[Arneson affidavit #2]

**Finding #22:** On or before the September 21 Mitchell City Council meeting, Mayor Toomey wrote out a statement [original Exhibit H] that he intended to read to citizens he anticipated would be attending the meeting in support of Dan Sabers, which read in pertinent part:

Because there have been concern regarding accountability and insight into the resignation of Dan Sabers, I will respond by telling everyone that the City is not permitted to speak openly about personnel issues to the public. The City's commitment is to not discuss personnel matters in order to protect a person's privacy and to protect the City. I can assure each and every one of you that every member on the city council knows the reasons for Mr. Saber's [sic] resignation and support [sic] those reasons....If I could give your more accountability and insight into Mr. Saber's [sic] resignation, I would.....but I can't, nor can the City Council. I have nothing more to say.....I think there is no need for further comment from anyone."

[Toomey affidavit, attachment #1.]

**Finding #23:** Mayor Toomey, on advice of counsel, chose to read a shorter statement at the meeting, in which he advised members of the public that they would "have the opportunity to state [their] concerns [in Executive Session]" and would "address the Executive Session one person at a time." [Toomey affidavit, attachment #2.]

**Finding #24:** The Mitchell City Council sat silent as "listeners" during the executive session. [Exhibit E; Answer, p. 7]

**Finding #25:** Mayor Toomey admitted that it was hard for him to remain silent during the executive session and not share his insight, but that he believed state law compelled him to say nothing. [Exhibit E]

**Finding #26:** The Mitchell City Council did not go into executive session for the purpose of discussing or considering Dan Sabers as a "prospective" Corn Palace Director.

**Finding #27:** When a matter is "discussed," it is generally understood to mean it is talked about and considered in "open and usually informal debate." [Merriam-Webster Dictionary]

**Finding #28:** The word "prospective" generally means "likely to be or become." [Merriam-Webster Dictionary]

**Finding #29:** The Mitchell City Council was aware that Mayor Toomey had denied Dan Sabers' request for reinstatement before it went into executive session on September 21 to listen to

members of the public who wished to address them about Dan Sabers and the Corn Palace Director position. [City's 10/30/15 response, p. 5 and original Exhibit "H"]

**Finding #30:** Prior to going into the executive session on September 21, 2015, member of the Mitchell City Council were aware that the Corn Palace Director opening was being advertised on the city's website and that Mayor Toomey, not the council, would be involved in the interviewing and hiring processes. [Toomey statements to *The Daily Republic* on 9/16/15]

### **Objections to OMC's Proposed Conclusions of Law**

**Conclusions #1:** *The Daily Republic* has no objection to Conclusion #1.

**Conclusions #2:** *The Daily Republic* has no objection to Conclusion #2.

**Conclusion #3:** *The Daily Republic* objects to the conclusion Dan Sabers was a "prospective employee" at the time of the Mitchell City Council's executive session on September 21, 2015, on the ground that none of the cited factors—"that he had asked to withdraw his resignation, no evidence of a formal denial of that request had been presented to the Commission, and the position of Corn Palace Director remained vacant"—is a relevant or material fact in making that determination.

**Conclusion #4:** *The Daily Republic* objects to the conclusion that the word "discussing," as applied to a public body under SDCL §1-25-2(1), should be defined to include "listening to information" on the ground such an interpretation is a contortion of the English language and a distortion of the limited purpose and function of the executive session exception.

**Conclusion #5:** *The Daily Republic* objects to the conclusion that there was no violation of South Dakota's open meetings law on the ground that the claimed exception, SDCL §1-25-2(1), does not apply to situations outside the public body's subject matter jurisdiction and, even if it did, on the ground that the real subject did not come within the scope of legitimate subject matter

in this case, because he was not a “prospective” Corn Palace Director at the time of the executive session.

**The Daily Republic’s Proposed Changes to Conclusions of Law**

*The Daily Republic* proposes that OMC’s Proposed Conclusions of Law #3, 4 and 5 be deleted and that the following Conclusions be added:

**Conclusion #3:** There is ample evidence, including Mayor Toomey’s letter to Dan Sabers [Finding #19] and Mayor Toomey’s written statement [Finding #20], establishing that Dan Sabers would not qualify as a “prospective” Corn Palace Director for purposes of the Mitchell City Council’s executive session “discussion” on September 21, 2015.

**Conclusion #4:** In every English language dictionary, the term “discuss” denotes some verbal exchange between people, which is distinctly different from the definition of “listen.”

**Conclusion #4:** SDCL §1-25-2(1) pertains to the “purpose of discussing,” not “listening” and plainly comprehends a situation in which the public body is engaged in the conversation and not merely listening to a presentation.

**Conclusion #5:** Mitchell City Code §1-6-1 (A) identifies the “director of the Corn Palace” as an appointive officer pursuant to SDCL §9-14-1.

**Conclusion #6:** Both Mitchell City Code §1-6-1 (B.2) and SDCL §9-14-3 provide that the mayor, not the city council, has the authority to appoint “appointive officers,.”

**Conclusion #7:** The Mitchell mayor has the responsibility to appoint the Corn Palace Director.

**Conclusion #8:** Mitchell City Code §1-6-1 (B.2) defers to applicable state law, SDCL §9-14-13, which gives the mayor, not the city council, the power to remove an appointive officer.

**Conclusion #9:** In accordance with SDCL §9-14-13, the Mitchell mayor has the authority to remove the Corn Palace Director and report the reason to the council at its next regular meeting under SCL §9-14-13.

**Conclusion #10:** In South Dakota the official meetings of public bodies are presumed to be open under SDCL §1-25-1 and the general objective is to promote transparency in government.

**Conclusion #11:** SDCL §1-25-2 is an “exception” statute, permitting closed meetings only under special circumstances.

**Conclusion #12:** It is well-established policy in South Dakota that statutory exceptions are strictly construed, giving the benefit of any doubt to the general law to carry out its purpose.

*Peters v. Spearfish ETJ Planning Com’n*, 1997 S.D. 105, ¶13, 567 N.W.2d 880; *1<sup>st</sup> American Systems, Inc. v. Rezatto*, 311 N.W. 2<sup>nd</sup> 51, 55 (S.D. 1981); *Western Surety Co. v. Mydland*, 179 N.W.2<sup>nd</sup> 3 (S.D. 1970); *Lien v. Rowe*, 92 N.W. 2<sup>nd</sup> 922, 924 (S.D. 1958).

**Conclusion #13:** SDCL §1-25-2(1) was not designed to permit a public body to go into a closed meeting for the purpose of “discussing” a matter outside its authority.

**Conclusion #14:** The Mitchell City Council does not have the authority to appoint or rehire a person for the position of Corn Palace Director, even if that person could be considered “prospective.”

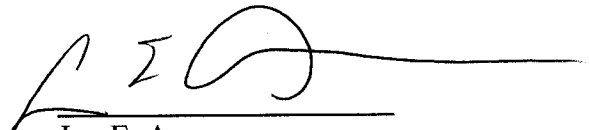
**Conclusion #15:** Because the subject matter supposedly being “discussed” by the Mitchell City Council under SDCL §1-25-2(1) was the mayor’s lawful prerogative, SDCL §1-25-2(1) could serve as the basis for the Mitchell City Council’s executive session.

**Conclusion #16:** Assuming, *arguendo*, that the Mitchell City Council could go into executive session to discuss a “prospective employee” for a position over which it lacked hiring/firing authority, the subject person in this case, Dan Sabers, was not a “prospective” in the legal sense in which that term is used in SDCL §1-25-2(1).

**Conclusion #17:** Based on the evidence now before the Commission, the Commission concludes that the Mitchell City Council’s executive session held on September 21, 2015, did violate the South Dakota Open Meetings Laws for the following reasons:

- a. SDCL §1-25-2(1) limits a public body to use executive session for the “purpose of discussing,” and does not reasonably encompass a public body intending to use and actually using executive session for the sole purpose of listening to non-members. In this case the Mitchell City Council intended to use and admitted to using the executive session only for “listening” and not for “discussing.”
- b. SDCL §1-25-2 is an exception to the general rule that official meetings are open to the public and is to be strictly construed.
- c. SDCL §1-25-2, reasonably interpreted as an exception statute, was intended to give public bodies the opportunity to discuss subject matter or business that comes under its authority. In this case the mayor, not the Mitchell City Council, has the jurisdiction over the Corn Palace Director position.
- d. An executive session convened pursuant to SDCL §1-25-2(1) is legal only if held for the purpose of discussing of one of the specific topics listed therein. In this case the Mitchell City Council’s contention that Dan Sabers was being “discussed” as a “prospective” Corn Palace Director is not supported by the evidence. The facts lead reasonably to the conclusion Mayor Toomey—the only person whose opinion mattered—did not seriously consider Dan Sabers a “prospective” employee at the time of the executive session.

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